Volume V] *July, 1900* [*Number 4*

The

American Historical Review

THE CRITICAL PERIOD OF ENGLISH CONSTITUTIONAL HISTORY

MORE than one period in the constitutional history of England may rightly be called critical. The concluding years of the reign of Richard II., and the periods of the Yorkist, Tudor, and Stuart dynasties are all critical in one sense of the word. But in none of these was anything more than the form of the result really at stake. Its essential character was never involved. The attempt of Richard II. to reverse the course of things was very skilful and to a certain point successful, but it fell in a time of most rapid and vigorous constitutional growth, and if the accidental personal element in the case had not furnished a leader to the opposition one would have been found elsewhere. We have at least every reason to believe so from the consummate leadership that must in some form have directed the marvellous constitutional advance of the fourteenth century. The revolution of 1399 might have been postponed for a short time, but Richard could not have prevented it nor have defended himself against it.

The Tudors were the heirs of the Yorkist monarchy, and constitutionally, from the present point of view, the periods are to be considered one. While the will of the sovereign during this period was as supreme in the control of public affairs as under the early Angevin kings, and while a despotism was established theoretically full of the most insidious danger to the constitution, practically circumstances which were of the very nature of the situation compelled an amount of dependence upon Parliament or alliance with it which prevented any permanently disastrous result. Some years before the close of the period it became evident, not merely that the constitution had suffered no loss, but that the time was ripe for that new advance which was undoubtedly aided by the character of the first Stuart kings.

The whole Stuart period is usually considered one constitutionally, but from the present limited point of view it falls into two quite different divisions. The first age, to the accession of James I., not merely presents no danger to the constitution but is one of most decided constitutional development, not in the construction of machinery—except to a limited extent in the reign of Charles I.—but in the putting of machinery into operation. The peculiar character of the first Stuart period is given it less by an attempt of the kings to be rid of the constitution than by an attempt of Parliament to put the existing constitution into actual operation in spite of the preference and determination of the kings to continue the personal government which had up to that time been the rule. It is not a period of the slightest danger to the constitution. It is rather the age in which the constitution becomes conscious of itself, if we may say so, in which the attempt is made for the first time to operate the constitution in opposition to the sovereign, or, with regard to what resulted from it, to transfer the actual exercise of sovereignty from the king to Parliament. The reign of James II. presents a different case. His was an attempt to resist, not by insisting upon doing what earlier kings had done—it was now too late to hope for success in that way—but rather by preparing to undo the work of the makers of the constitution and to repeat the attempt of Richard II. The revolution of 1688 and that of 1399 are as closely parallel as it is possible for two historical events to be, and the constitution was never in so great danger in the second as in the first period, and never in serious danger in either.

If by the critical period of English constitutional history is meant an age when the real character of the result as well as its form and details were at stake—when the course of constitutional growth might have been turned in a different direction—we must find it, as we must in nearly every case of vigorous growth, near the beginning. In this sense the critical period of the English constitution, the decisive period which controlled the future, was the thirteenth century.

At the end of the twelfth century no indication is to be found, in the existing situation, of the constitution which was to be. If the conditions of the time looked forward to anything it was to a result like that in France, to an almost ideal absolutism, a government in which all the machinery should be operated by the king and exist only to give expression to his will, with no means of limiting that will or even of giving expression to a will in opposition. From this result England was saved during the thirteenth century, and this not by the possession of any peculiar institutions nor by any

statesmanship or foresight, but by a series of events and circumstances which were almost accidental in character.

At the close of the twelfth century England was still a thoroughly feudal state.[1] The beginnings of important changes which go back to an earlier date had as yet produced no essential modifications in that system. As a feudal state, England differed but little institutionally from the feudal states of the Continent, but much practically in the greater power of the sovereign. This is only saying that it was a feudal state of the type of a barony rather than of a kingdom. It was the feudalism of the duchy of Normandy expanded into the feudalism of the kingdom of England without any essential change of character. In so far as the general institutions of the state are concerned there was nothing which furnished any check upon the king, or which promised to develop into any check which was not strictly feudal in character, nor any precedent of resistance to his will which was not also feudal. Hardly can we say that there was any precedent of successful resistance at all. The tendency towards a limitation of the sovereign which was latent in all feudalism and which was destined under favoring conditions to lead to such important results in England, was still too slight to be capable of any except the most temporary and local application, or to give the faintest promise of any future growth.

At the close of the next century there is evident a complete and revolutionary change, as if there had occurred somewhere in the interval a night of the 4th of August and the meeting of a Constituent Assembly. Feudalism—true feudalism—had disappeared as a ruling system from the domain of both public and private law, or it would perhaps be more accurate to say that as a political and economic system feudalism was just transforming itself into its most permanent contributions to English institutions, under anything like the original form ; on one side into the land law, even at that date highly artificial because based upon a system which no longer corresponded with the facts, and on the other side into the group of new institutions derived from the *curia regis*, of which the most important was the parliament. With reference to the other chief element of the situation at the beginning of the century, the absolute

[1] The extent to which feudalism pervades the historical sources of the Norman and early Angevin reigns has hardly been sufficiently recognized. Had every other monument of feudal law disappeared it would be possible to reconstruct almost the whole body of it from the second volume of the Abingdon Chronicle alone. By this I mean of course the living principles and practices of the tenth and eleventh centuries, not the more highly elaborated and technical law of the thirteenth century and later lawyers. Some other collections give more information still upon special sides of feudalism, as the Ramsey cartulary upon economic feudalism and the Gloucester cartulary upon the legal questions involved in the transfer and lease of land.

kingship, an equally great change had taken place, though the change here was less nearly completed. The unlimited kingship had indeed disappeared and if it is hardly possible to say that a definitely limited kingship had taken its place, the idea of such an institution had been formed, the fundamental principles upon which it was to be based had been clearly and consciously conceived, a series of precedents of their successful enforcement against the opposition of the sovereign had been established and the machinery by which in the end the government was to be operated in accordance with them had begun to take form. The continuous and rapid progress of the fourteenth century was needed to erect upon these beginnings anything which may be called a constitution in the modern sense, but the thirteenth century was the determining and creative age which rendered the work of the fourteenth possible.

If at the beginning of the thirteenth century England was still a thoroughly feudal state, in the feudal system of the twelfth century one development of decisive influence upon the future had taken place. The extreme severity with which the kings enforced their feudal rights and pushed them to the utmost limits, as in the case of wardship and marriage, had forced the baronage to study the question of the king's rights from their own point of view, and to endeavor to define and limit them by specific formulation. The charter of Henry I. as a statement of feudal public law is crude and incomplete. It could not be otherwise considering its date, and it is but slightly more so than the similar statements of both public and private feudal law which were made at about the same time in Italy;[1] but its purely practical character is evident at a glance. It is an attempt by definition of existing rights to check a development of them in favor of the king which the barons had reason to fear had already begun. That progress in this direction was made during the following century is evident both in the far greater clearness of conception and statement in the Magna Carta, and, in a different way, in the assertion at about the same time that feudal obligations in England did not include service in France—a claim which the recognized feudal law of the beginning of the century would not warrant. Of all the influences existing in England at the beginning of the thirteenth century which could shape the progress of that age, this tendency to subject the rights of the king

[1] It is true that this distinction does not exist in feudal in the same way that it does in other systems of law, that the feudal system is, as it has been called, a usurpation of the domain of public by private law; and yet, if the distinction is not pushed too far, it is useful and for certain purposes necessary. There is a sense in which the *curia* of the king is a different thing from the *curia* of a minor baron, though no line of institutional difference can be drawn between them.

to strict scrutiny and definition is the most important. It is the only tendency opposed to the absolutist drift of the time, and combined with the fundamental principles of feudalism it determined the result.

At the beginning of the thirteenth century, the fact which set in motion the train of events, was the break-down of the feudal system as a source of government supply. The increasing amount and complexity of business in England, which showed itself on one side in the rapid development of the royal courts, showed itself upon another in the increasing expenses of the government, which it was no longer possible to meet with the ordinary sources of revenue. To the men of the time the efforts of the kings to raise money were signs and proofs of their complete depravity, and there is no doubt but that the difficulties of the case were complicated through more than half the century by bad government; but the best king that ever reigned, had his lines fallen in England in the thirteenth century, would have been forced to resort to much the same expedients. The French monarchy had to face this difficulty later and less suddenly than the English, but it made use of practically the same means to meet it, and experienced practically the same opposition, though this was for special reasons less united and less intelligent.

If it could have been possible for John, or for his minister, to have an idea so far in advance of his time, we should be tempted to say of him that he was trying in the early years of his reign to develop something like the regular annual revenue of a modern state. To do this under the conditions of the time required, not merely the most arbitrary action on the part of the king, begun and directed by his will alone, but also a more violent straining of the king's feudal right than any of his predecessors had ventured upon. It is no wonder that the alarm of the baronage was excited. If they had not had behind them the training of a century and a half in guarding carefully their feudal rights against the encroachments of an absolute monarchy, they could hardly have failed to realize the tendency of these measures. While, however, the question of taxation set in motion the train of events, Magna Carta shows plainly that the barons had not failed to recognize the more insidious but equally great danger with which they were threatened by another advance of the royal power—by the rise in the king's courts of another system of law and justice than the feudal. This involved a violation of feudal law less openly and directly than did John's taxation, but quite as truly; and many provisions of the charter, both of a general and of a special character, are aimed against it.

But these tendencies of John's toward absolute action were only the natural continuation of tendencies which had begun at least as early as his father's time, and which had continued through his brother's reign. There is evidence in the Magna Carta that this fact had not been unnoticed by the barons. But if they had been conscious of the drift of the kings' policy they had been apparently powerless against it. There was no opportunity under either king to arrest it. What made successful opposition possible under John, and gave the opportunity for the Magna Carta, was not the fact that this tendency was now more rapid and undisguised, but it was the character of the king. Had John been as firm and steady as his father, or even as his brother, it is more than probable that he would have been successful. It was John's badness, and in the essential matter his weakness, which made it possible to unite against him a powerful opposition, and to force him to a formal and emphatic recognition of the rights of his vassals. In other words, the existence of the Magna Carta—the first step toward the English constitution—depended on the character of the king, always something of an accident in a monarchy.

Examined from the point of view of those who framed it, the Magna Carta will be found to contain three great provisions or sets of provisions. First, no taxation of the feudal community without its consent, beyond the regular aids.[1] Second, no modification or violation of the law by the arbitrary action of the king; and third, should the king be determined to free himself from the law, the right of forcing him to submit to it by civil war and if necessary by temporary deprivation of the royal power. It will be seen at once that this last logically involved to make it complete what the Magna Carta explicitly disavowed, but what was immediately and continually found necessary, the right of permanent deposition.[2]

[1] It will be noticed that while Art. 12 of Magna Carta does not prove that London was a commune it places it for the purpose of the article in the position of a king's vassal, which was technically the position of the French commune. This is the more noteworthy as a comparison of this article with Art. 32 of the Articles of the Barons shows that the point was somewhat carefully considered.

[2] This right and not that of electing the king was the essential one upon which the security of the constitution depended. The old Teutonic election was as empty a form in England as in France. The right of choosing the successor of a deposed king was a logical but unessential result of the right of deposition. What was absolutely necessary to the continued existence of the constitution was the right of deposing a king already in possession of the throne, or of holding this fate in reserve as a means of coercion. That the right of election received later so much more emphasis than the right from which it was derived was due to accidents of the situation at the accession of one dynasty after another, while few occasions arose for the exercise of the more fundamental right.

It would be of course impossible that the right of deposition should be formally embodied in the public law of any state not on the verge of dissolution. See the account

It is hardly necessary to say that these provisions were all drawn directly from the feudal law and were recognized incidents of that law wherever it existed, or that in this form they could not have been derived from any other system of public law existing at the time.[1] They are merely specific forms of the fundamental principle of feudalism that the relation of lord and vassal was the result of a voluntary agreement by which both were alike bound and which neither had a right to modify without the consent of the other. The whole body of the feudal law was a development of the idea of contract, and the great pre-occupation of those who framed it was to guard against any unwarranted infringement of the contract, direct or indirect, by either party to it. That much the greater portion of feudal law as written elsewhere consists of limitations upon the vas-

of this period in Plehn's *Matheus Parisiensis*—a very interesting discussion, but too theoretical and too strongly influenced by apparent analogies in the institutional history of Germany. The treatment of the question of election to the crown in Roessler's *Kaiserin Matilda* agrees better with the facts.

[1] On the feudal right of insurrection and on other rights which the charter emphasizes, especially on clause 39, see Dodu, *Histoire des Institutions Monarchiques dans le Royaume Latin de Jérusalem*, pp. 159–171. This book is an admirable introduction to the study of the Magna Carta. In some points of detail at least the feudal situation in England was more closely parallel to that in the Kingdom of Jerusalem than to that in France.

That the clauses embodying the first and third of these principles were dropped from the Magna Carta as reissued during the century is not a matter of importance. Practice constantly respected both. In taxation we have evidence that the barons watched carefully over their rights (see Shirley, *Letters of Henry III.*, I. 151; the action of the county court, which Stubbs supposes in this case, is not evident in the text; *Const. Hist.*, II. 224–226), and at the close of the century the principle in greatly expanded form—the whole idea of taxation having changed in the meantime—was virtually restored to the Magna Carta in the Confirmation of the Charters. A very interesting statement of the other principle is that which was extorted from Henry III. in the Confirmation of 1265: *liceat omnibus de regno nostro contra nos insurgere.* Stubbs, *Charters*, p. 416.

In regard to these omissions, which have occasioned much discussion and which cannot yet be fully explained, these points may be suggested. If clauses 12 and 14 of the original Magna Carta were strictly interpreted, they required the summoning of the common council of the kingdom and its action on the occasion of every extraordinary grant, instead of what seems to have been the more usual and certainly more convenient feudal method of consent by local groups or by individuals. If scutage was understood in its strict feudal sense and no account made of the irregular or changing meaning of the word, the provision in 12 and 14 must have seemed to many of exceedingly doubtful propriety. Probably clause 44 of the reissue of 1217 affirmed all that was intended by clause 12. If the king could be trusted to respect the law, clause 12 was unnecessary; the general principle of the law fully covered the case, as it did not the details of action in such cases as wardship and marriage, and clause 35 of 1217 may have been considered a sufficient pledge. A comparison of the four editions of the charter to 1225 shows that there was a constant study of its language and constant attempts to improve it in clearness and to avoid saying more or less than was meant. One is tempted to say that some of the changes must have arisen from attempts to enforce the provisions of the charter in the courts.

sal's right of action does not make the Magna Carta really exceptional or indicate that it is not to be classed among the statements of feudal law. The formal feudal law, like every system of law, occupied itself with the protection of those rights most exposed to attack. In England, as we have already said, the extraordinary power of the sovereign compelled a careful scrutiny of his rights, an explicitness in their definition, and an emphasis of the illegality of other action which was not common elsewhere. In the field which more nearly corresponds with private law we have the same conditions as on the Continent, and English land law is occupied mainly with limitations upon the vassal's action.

If we reduce these three principles to their simplest form of statement they mean that the king is bound to observe the law and that if he will not he may be compelled by force to do so. It will be again seen at once that this is the corner-stone of the English constitution. It is the underlying fact of its history—the protective and creative principle which made it possible. Henceforth—if the Magna Carta becomes permanent law—the king is subject to the public law of the state. Henceforth against an arbitrary king civil war and deposition are not revolutionary in English history. They are legal and constitutional expedients, as Parliament is reported to have said in effect to Richard II.

This gives us the place of the Magna Carta in the constitutional history of England. It is not a creative document. It contains nothing new except the provision, temporary in its very nature, creating a body of twenty-five barons to enforce its provisions. In its statement of specific law it looks backward and not forward. It belongs to an old system which had served its purpose and was doomed to destruction. But in this fact consists its inestimable service. It gave a permanent form to the fundamental principles of the feudal system at the moment when that system was giving way upon every side. For the barons could not save feudalism. The needs and interests of society which had once created that régime were now working with the kings against it. Evidence of this tendency is not wanting even in the Magna Carta, and before the close of the century in some important matters the barons themselves found, unconsciously but truly, their anti-feudal outweighing their feudal interests. The danger was that with the system itself these pregnant ideas would disappear also, as they did elsewhere. The Magna Carta by its formal statement made their preservation depend no longer upon the continued existence of the system from which they sprang, but upon the conditions of the future. What service was rendered by the Magna Carta in later stages of the

history of the constitution when a not unnatural idealization had given to some of its clauses a meaning which would have seemed strange to the men who wrote them, it is not the place here to enquire. At the moment when the foundation of the constitution was laid it was its great and sufficient service to lay that foundation, to carry over from the system which was disappearing into the new system which was taking form, and whose form was yet undetermined, the controlling principles which shaped and fixed the future. The importance of the Magna Carta in English constitutional history never has been and cannot be exaggerated, even if much that has been said of it in the past is unwarranted by the facts. Upon the principles which it enunciated rests the whole constitution. Without them, constantly cherished and courageously enforced, the constitution never could have been made; the inevitable tendency of declining feudalism towards a strong monarchy would have triumphed, and Parliament itself, which would have been formed in any case, would have been as helpless against powerful kings as the French estates general.

This is saying that the English constitution rests finally upon the feudal system. The formative principles of the constitution were derived directly from the feudal system. Without that system the constitution, as it existed in the fifteenth century or as it exists to-day, would not have been possible. The English limited monarchy of later times could never have been regarded as a direct outgrowth of the Saxon, non-feudal state, as it existed for instance under Canute, except by a preconceived and strained interpretation of the facts of history. The whole drift of that state was toward a monarchy of the Carolingian type in which the crude checks upon the sovereign's will or equally crude machinery for operating the nation's will, belonging to the primitive German public law, had either entirely disappeared or been dwarfed into insignificance.[1] The accomplishment of this result was made impossible in England by the Norman Conquest. It was the thorough feudalization of England which resulted from the Conquest that made the constitution possible, not by establishing a strong monarchy against which primitive Teutonic liberty reacted later, but by introducing with the strong monarchy a new

[1] To speak of these as checks upon the sovereign's will is to carry back our conceptions into the earlier time where they did not exist. They were not checks upon the sovereign's will as such in the Teutonic constitution. They were rather survivals of an earlier form of government disappearing before the new and rapidly increasing monarchical power. The Saxon monarchy advanced along this road so much more slowly than the Frankish not from any greater devotion of the race to liberty, nor because it possessed different or better institutions, but mainly because one set of influences, most decisive in hastening the results on the Continent, was lacking—the Roman survivals.

conception of the relation of the king to those of his subjects who in that age constituted the nation, and who alone could constitute it, by introducing the definite contract-idea of the feudal system.[1]

In the meantime the Magna Carta itself determined nothing. All depended upon the interpretation and application which should be given it in the future, and if the opportunity to put it into form depended upon the accident of a king's character so also did its position in the future. Had a king like Henry II. or Edward I. reigned in England during the fifty years which followed the death of John the Magna Carta might have made more difficult, but it would not have made impossible, the completion of the work which John had begun in the early years of his reign. Such a king might easily have thrown the Magna Carta into the background, have avoided any repetition or ratification of it, and have established a series of precedents of royal action without reference to the law which it would have been very difficult to overcome. The events of the months immediately following the granting of the charter make this certain, and while the attempt to enforce the principles of the Magna Carta by civil war and deposition before the death of John was of the greatest value as a precedent it was too inconclusive to determine the future. Of far greater value were the precedents established in the reign of Henry III., carrying the right of controlling the king by force far past the middle of this century of transition and making it a permanent element in the new conception of the state then forming in England. This result was rendered possible by the long reign of Henry III., as a king as bad as his father, weaker in character and less able, prodigally wasteful of money and constantly under the influence of foreign favorites.

The results of this reign in many directions it is impossible even to outline in this article. For the present purpose these suffice as resulting partly from the character of the king and partly from the position of the foreigners in England :

1. The formation of a distinct, continuous, and almost in our sense of the word an organized party of opposition which even the arbitrary methods of Simon de Montfort were not able to destroy. This was the instrument by which the work of the reign in continuing the tradition of the Magna Carta was accomplished and the results here indicated produced.

[1] That the feudal system would in the course of time have been introduced into England if the Norman conquest had never occurred is more than likely. But the slight tendencies toward feudalism already manifest in Saxon England had up to that time produced no result of importance, and the practices which may be termed, in a popular sense of the word, feudal, do not clearly exhibit the institutional characteristics of Continental feudalism.

2. The beginning of a new conception of the nation and the state—of the nation as something standing over against the king, to be distinguished from him in thought, having great interests of its own which might clash with those of the king—not exactly our idea of the organic nation but rather of the community of those classes which had a definite interest in the condition of public affairs—a primitive and undeveloped idea but richly fruitful even at that time. And of the government of the state no longer as of something belonging to the king personally, to be administered by his will and in his interests exclusively, but as something belonging as truly or even more truly to the nation, with which the king is vested but which he is bound to administer in the interests of all according to certain recognized principles, so that if he does not he may be temporarily at least divested of his right to rule and others may be appointed in his stead to correct the abuses which he has permitted to exist.

3. These ideas together, as acted upon and enforced by the opposition, gave birth to the idea of the limited monarchy, of the king limited in his action not merely by certain specific provisions of the law, but by the interests of the community, and law and interests alike guarded by the leaders of the community, soon to be able to act through definite and rapidly improving institutions.

The series of events during the reign in which these ideas were given expression is less important, institutionally considered, than as continuing the tradition of the Magna Carta and determining and enlarging its interpretation. The most important of them—the Provisions of Oxford—have no institutional significance. They are of interest as the beginning of a series of apparently unconnected but similar experiments, whose object seems to be to devise some kind of machinery by which the authority of a king who abuses his trust may be temporarily exercised by the leaders of the nation or by Parliament—a series which goes on into the fifteenth century almost to the point when, under the Lancastrian dynasty, faint beginnings show themselves of what was to be in the end the machinery for the permanent exercise of executive authority by the nation, the cabinet system.

Though these ideas of the relation of the king to the nation and to the government were still crude and but half-consciously held, they represent great progress since the accession of John. They were, it is true, logically involved in or easily derived from the feudal idea of the relation of the king to his vassals, but they were not likely to take shape under a king like Henry II. The opportunity, first, to give these ideas in their primary and undeveloped

form an expression which tended to render them permanent, and then to carry them forward in expanding growth, was due to what must be called, so far as human insight can go, the accident of two successive reigns of bad and weak kings. From the end of the reign of Henry III. their growth depends much less upon accident; they are exposed only to the dangers incident to growth, though it is not until after another reign with its continued precedents and its complementary institutional growth that they may be called secure. From the beginning of the fourteenth century their development could have been prevented only by revolution, and this would have been possible only by the occurrence together, on the one side of a king able to foresee the future and strong enough to control the means of action, and on the other of circumstances paralyzing the action of the opposition, a conjunction not likely to occur and as a matter of fact never occurring.

By this date then the nation had begun to be conscious of itself and to realize its right to compel the king to regard its interests. But ideas of this sort are never of much value in history unless they are embodied in institutions through which they can act directly and permanently upon the course of events, and the attempt which was made at that time to give institutional expression to these ideas was wrong in principle and destined to no result. In another direction, however, unconnected for the present with these ideas and quite unconsciously, another institutional growth had begun which soon furnished the required machinery and, in its latest development, has so completely transferred the executive authority from the sovereign to the nation as to render any further conflict between them impossible. This beginning was made by a modification of the feudal *curia regis* which was apparently slight in character but which was revolutionary in its consequences.

It is a familiar fact that the Magna Carta shows that a division of the baronage had already been made into two classes, the major and the minor barons. Such a distinction as this was not peculiar to England, nor was this an early date for it. The especially important fact is that at the beginning of the thirteenth century this distinction of classes in the membership of the *curia regis* was consciously and sharply made, thus enabling a modification to be made of the basis of membership of the least important of these classes in the *curia regis* without seeming to change at all the character of that institution. Two generations also of experience of the jury system in public business in special relation to the minor barons had made familiar an easy method by which this change could be accomplished. Suggested beyond any doubt by the jury system,

formed by its methods and upon its model, and in order to accomplish the same result in a different kind of business,[1] the introduction of the new element into the *curia regis* seemed a most natural and easy step. Indeed it is using other ideas than those of the time to speak of a new element at all. At the moment when this step was taken, probably the most important ever taken in the strictly institutional history of England, no one appears to have been conscious of anything new. It was the beginning of a real change and might have been followed, even if innovation had gone no further, by the most important consequences; but considered by itself it involved no necessary departure either in principle or in law from the feudal system. It was simply a change of method. Not so the step which followed next although it is true of this also that it was taken apparently without any consciousness of change. This step was the introduction into the *curia regis* of certain non-feudal elements, the representatives of selected towns.

In considering the history of this step not too much emphasis should be laid upon the summons issued by Simon de Montfort in December 1264. It would be very difficult to show that this act was regarded by anyone later as a precedent to be followed or that it had any influence upon the final result. Borough representatives would have been summoned to the great council by the close of the century if Simon's writs had never been issued and for reasons very different from those which influenced his action. It was inevitable at a time when stricter feudal ideas were rapidly disappearing and in a régime which was one of classes only, that a class so distinct as the burgesses, having so many interests peculiar to themselves in the conduct of government, and having also such rapidly increasing power and such means of making their power promptly felt, should be allowed a voice in the management of public affairs. It should not be overlooked that the thing which was peculiar to England and decisive in its constitutional history was not the creation of Parliament nor the invention of the representative system, however important and interesting some peculiarities of detail may be in both particulars. The peculiar and determining fact was that Parliament at the moment when it came into existence as a distinct institution

[1] That is, to make known the local feeling. See especially the writ of 1254 (Stubbs, *Select Charters*, p. 376), which deserves most careful analysis. Just when the modern idea of organic representation arose or from what earlier idea it was derived, it is difficult to say. It could hardly have been found in the shire courts, but it apparently formed itself during the age of the formation of Parliament, though just what was meant by some of the phrases used may be open to question. The original idea seems to have been less that the community should assist through its representatives in forming the opinion and making up the decision of a deliberative body than that it should convey by delegates its own decision already made.

found ready to its hands, as the result of a line of development independent of its own, a traditional policy of opposition and of the control of the sovereign, based upon definite principles and rights. As the heir of the feudal *curia regis* it inherited a right of consent to extraordinary taxation, now greatly enlarged in importance and practically the sole dependence of the government. As embodying the party of opposition, from now on strongly reinforced by the leaders of the new third estate, it was the guardian of the old right of protecting the law against the king, enlarged by the experience of the century into the right of protecting the general interests of the nation. It was upon the basis of these rights, reaffirmed in their enlarged significance in action and in statement at the close of the century, that Parliament erected the constitution.

But if the burgesses were certain to be admitted into the older institution there was nothing in that fact or in any other circumstance of the time that determined the form and character which the new institution was to assume, and this was a question of vital importance for the future. Upon it depended the existence of the constitution quite as much as upon the survival and the broadened significance of the ideas of the Magna Carta. In this particular the decisive period, the danger period, was that which extended from 1254 to 1295. We have a right, I think, to make 1295 the date of the beginning of Parliament. To be sure there was nothing whatever about the parliament of 1295 considered by itself alone which indicated that it was to be any more truly the model parliament than any one of the different experimental forms of the preceding forty years. It possessed more of the features of the *curia regis* than of a later parliament;[1] the whole question of estates and of organization was still unsettled; the struggle for the supremacy of the new parliament over the survivals of the old *curia regis* had still to be fought out in the following century, but as a historical fact the parliament of 1295 was the model parliament. The age of experimenting was over. In all the creative fundamental principles, both of constitution and of powers, Parliament was in existence as a different thing institutionally from the old *curia regis*. The later development was a perfection of details, an application of established principles to a constantly enlarging range of cases, not a work of new creation.

[1] It is a very interesting fact in the institutional history of England that, after the permanent division into two houses in the next century, the upper house was consciously regarded as continuing the *curia regis* and the lower house as something foreign to it. This is to be seen in such facts as the freedom of the members of the upper house, but not of the lower, from trial by jury; in some of the features of the struggle between statutes and ordinances; in the continued judicial power of the upper house in which the lower had no share; and in the extraordinary form of the impeachment trial.

To understand how easily a different and far less efficient form might have been given during this period to the new institution, or indeed how little effort it would have required to have prevented altogether the formation of a really effective parliament, it is only necessary to study the forms which the institution assumed during this transitional period. Especially instructive are the occasions when we find the two forms which were later most successfully employed by the French kings in weakening the estates general—the division of the national parliament into provincial assemblies and its division into distinct assemblies of the different estates. These forms occur without especial comment or protest. The danger which lay in them was not evident. Their competence within their separate fields was not less than that of a full parliament of the next century, considering the difference of date. Nothing indicates that there would have been any difficulty in directing the future development of Parliament along the line of these precedents. Indeed the kings for some time continued to negotiate separately with some of the classes to avoid the difficulty of dealing with Parliament and were induced at last to give up the practice only by the most skilful management of the House of Commons in the fourteenth century. It is not necessary to say, however, that if these had been the controlling precedents no parliament would have been formed in the English sense and no constitution.

What saved Parliament and the constitution in this crisis was ignorance, was the lack of experience. Had it been as possible for Edward I. to foresee the future in this respect as it was for Charles V. and Charles VII. of France, and to understand the danger to the monarchy which lay in the growth of a strong parliament, he could, so far as we can now see, and he probably would, have prevented it. It was hardly possible to do this after the close of his reign; it was entirely impossible after the deposition of Edward II.

The date of the Confirmation of the Charters may be taken as the close of this period of English constitutional history. From a time when no beginning of a constitution is apparent, when every circumstance promised the speedy formation of an absolute rather than a limited monarchy, and when the slight tendency earlier manifest in English feudalism to check a development of royal power had been so long without influence as to seem about to disappear, from such a time England had advanced through the three great crises which have been described to what is clearly a constitutional beginning, with a more or less organized opposition, acting upon clear and definite principles capable of wide application, and through a primitive but even then most efficient institution capable also of

rapid and extensive growth. From this beginning Parliament made, as has been said, the enormous advance of the next century. This it did by the attachment of conditions to grants of money; by cutting off all uncontrolled sources of revenue; by insisting upon the equal right of the House of Commons in all legislation; by extending parliamentary control from the income to the expenditure of the state; by declaring the king's ministers responsible to itself as well as to the king; by extending in the revolution of 1399 the right of deposition into a right of breaking the order of succession; and, as a result of that revolution, by denying the responsibility of members to the king for their action in Parliament. A bare enumeration of these achievements shows how very far the transformation went in that century of the old feudal absolutism into what may rightly be called a constitutional monarchy, and how very complete must have been the preparation afforded by the work of the thirteenth century.

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